Office-Supreme Court, U.S.
FILED
OCT 7 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 477.

AMERICAN EXPORT LINES, INC.,

Petitioner,

against

CATERPILLAR OVERSEAS S.A.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

F. HERBERT PRIEM,
Counsel for Respondent,
99 John Street,
New York, N. Y.

TABLE OF CONTENTS.

	PAGE
The Facts	2
Petition	5
Question 1	5
Question 2	7
Question 3	13
Question 4	15

Table of Cases.

	PAGE
Calderon v. *Atlas S. S. Co.*, 170 U. S. 272 (1898)	11
Commercial Corp. v. *N. Y. Barge Corp.*, 314 U. S. 104, 110-111 (1941)	13, 14
Commercial Molasses Corp. v. *New York Tank Barge Corp.*, 314 U. S. 104 (1941)	17
Constable v. *National Steamship Co.*, 154 U. S. 51 (1894; accident occurred in 1883)	11
The Buffalo, 56 F. (2d) 738, 739 (2 Cir., 1932)	13
The Delaware, 161 U. S. 459 (1896)	11
The Eddy, 72 U. S. 481 (1866)	11
Federal Insurance Co. v. *American Export Lines*, 113 F. Supp. 540, 542 (SDNY, 1953)	11
Federal Insurance Co. v. *American Export Lines, Inc.*, 113 F. Supp. 540 (SDNY, 1953)	10
The T. J. Hooper, 60 F. (2d) 737, 740 (2 Cir., 1932)	13, 17
Isthmian S. S. Co. v. *California Spray-Chemical Corp.*, 290 F. (2d) 486, 489 (9 Cir. 1961); original opinion adhered to on rehearing, 300 F. (2d) 41, 45-47 (9 Cir. 1962)	10
Isthmian S. S. Co. v. *California Spray-Chemical Corp.*, 290 F. (2d) 486 (9th Cir., 1961); on rehearing, 300 F. (2d) 41 (9th Cir., 1962)	7, 9, 12
The Jungshoved, 290 Fed. 733, 734-735 (2 Cir., 1923); cer. den. 263 U. S. 707	13
Mackey v. *United States*, 83 F. Supp. 14, 18-19; affd. 197 F. (2d) 241, 243 (2 Cir., 1952)	6
McAllister v. *United States*, 348 U. S. 19, 20 (1954)	16
Morris v. *Lamport & Holt, Ltd.*, 54 F. (2d) 925, 926 (SDNY 1931), affd. *per curiam*, 57 F. (2d) 1081 (2 Cir. 1932)	10
North American Smelting Co. v. *Moller S. S. Co.*, 204 F. (2d) 384, 386, 388 (3 Cir., 1953)	10

PAGE

The Portuguese Prince, 209 Fed. 995 (SDNY, 1913) 10

Remington Rand, Inc. v. *American Export Lines*, 129 F. Supp. 138 (SDNY, 1955) 6

Remington Rand, Inc. v. *American Export Lines*, 132 F. Supp. 129, 138-139 (SDNY, 1955) 11

Schroeder Bros., Inc. v. *The Saturnia*, 226 F. (2d) 147, 149 (2 Cir., 1955) 18

Schnell v. *The Vallescura*, 293 U. S. 296, 303-304 (1934) 14, 18

The Tangier, 64 U. S. 28 (1859) 11

Texas and Pacific Ry. Co. v. *Behymer*, 189 U. S. 468, 470 (1903) 17

Wabash Railway v. *McDaniels*, 107 U. S. 454, 459-461 (1882) 11, 17

Waterman S. S. Co. v. *United States SR&M Co.*, (5 Cir.), 155 F. (2d) 687; cer. den. 329 U. S. 761 (1946) 6

STATUTES.

Carriage of Goods by Sea Act,

Section 4(2)(q) 5, 6

Section 1301 (e) 5

Section 1303 (b) 3, 4, 14

Section 3 (6) 14

IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 477.

AMERICAN EXPORT LINES, INC.,

Petitioner,

against

CATERPILLAR OVERSEAS S.A.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Court of Appeals decision, which is sought to be reviewed, reversed a decree for petitioner, which was contrary to decisions of the Courts of Appeals for the Second, Third and Ninth Circuits.

The principal issue presented by the petitioner is whether its responsibility for the tractors, as a common carrier, ceased, by reason of Clauses 1, 4 and 12 of its bill of lading* upon their transfer to the deck of the lighter—although they purport to relieve petitioner from liability for negligence during lighterage.

---

* Clause 1 provides that "The Carrier shall not be liable in any capacity whatsoever for * * * loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier."

Clause 4 provides that the carrier may discharge the goods onto a craft and when they are so discharged "they shall be at their own risk and expense" and "such discharge shall constitute complete delivery and performance under this contract".

Clause 12 provides that the carrier "may discharge the goods directly they come to hand, at or onto any wharf, craft or place that the Carrier may select" and that all lighterage and use of craft in discharging "shall be at the risk and expense of the goods". (R. Vol. II, p. 57.)

The Facts.

Petitioner's statement of the facts is so inadequate that we find it necessary to state them more fully.

On December 30, 1959, at the port of New York, Caterpillar Overseas, S.A. shipped two tractors, owned by respondent, on the SS. *"Expeditor"*, a vessel owned and operated by the petitioner, for carriage to Tripoli, Libya (R. Vol. 1, p. 12).

Upon arrival at Tripoli, the ship anchored in the harbor, where, on January 18, 1960, the two tractors, together with cargo owned by other consignees, were transferred from the ship, by use of her tackle operated by stevedores, to the deck of a steel lighter (R. Vol. 1, p. 12). The stevedores were employed and paid by W. E. Rippon & Sons, petitioner's local agent (R. Vol. 1, pp. 12, 19).

While the stevedores were lifting a slingload of cargo intended for another consignee from the ship's hold, the lighter listed toward the ship and the two tractors were cast overboard (R. Vol. 1, p. 12).

The lighter was owned by the United States Government and assigned to Army marine personnel based at Tripoli. It had been chartered by the Army to the Tripoli Port & Lights Department, from which agency it was hired by Rippon (R. Vol. 1, p. 13; Ex. B, R. Vol. 1, p. 86), who had represented petitioner at that port for many years (R. Vol. 1, pp. 39, 62). Rippon paid the Port & Lights Department for the hire of the lighter, which was for the term of one year (R. Vol. 1, pp. 13, 62; Ex. B, R. Vol. 1, p. 86). Respondent and other consignees of cargo were billed by Rippon for lighterage services, calculated on a tonnage basis (R. Vol. 1, p. 63).

The lighter was 80 ft. long and 20 ft. wide of steel construction, with a flat top. Below, it had eight separate

sections, or tanks, each 10 ft. long and 20 ft. wide, bolted together (R. Vol. 1, p. 13). There were no cross bulkheads in the lighter or other means of baffling water in its tanks (R. Vol. 1, p. 59). There were no sounding pipes in any of the tank sections, and the lighter was not equipped with a pump; water, normally, was removed from the tanks daily—when no cargo was aboard—by another U. S. Army boat, which moved about the port to where the lighters lay (R. Vol. 1, pp. 13, 52, 55). The lighter had been in constant use during the week preceding the accident (R. Vol. 1, p. 52). When loaded, there was a probable delay of ten days before inspection would be made (R. Vol. 1, p. 61). Petitioner offered no proof as to when the lighter had last been pumped.

The only means of ascertaining whether a tank contained water was by removing its manhole cover, which was single bolted (R. Vol. 1, p. 47)—a simple operation which could have been done by one person with the aid of a wrench (R. Vol. 1, pp. 70-71).

The respondent was neither consulted by Rippon concerning the use of the lighter, nor notified of the discharge of the tractors thereon (R. Vol. 1, p. 64).

The tank top covers were not equipped with gaskets and water could enter the tanks through the outer edges of the tank top lids which, through use and having no gaskets, were warped and not watertight (R. Vol. 1, p. 50); it is customary to use gaskets on such manhole covers (R. Vol. 1, pp. 50-51). There was a hole, 2½" x ½", in a plate of the lighter leading to a tank into which harbor water could enter through wave lap (R. Vol. 1, pp. 51-52, 53-54).

The only evidence showing the character of inspection made of the lighter for seaworthiness, prior to the tractors being placed on its deck, was a 5 or 10 minute walk over the deck by an Arab stevedore foreman (R. Vol. 1, pp. 68-69),

MICRO CARD
TRADE MARK ®
22

MATTHEW BENDER & COMPANY
MB

CD 214

49-64

microcard

employed by Rippon, petitioner's agent (R. Vol. 1, p. 12). No manhole covers were opened by him, or other parties, to ascertain whether water was in the lighter's tanks, and no inspection was made of the sides of the lighter (R. Vol. 1, pp. 68-69).

The petitioner offered no explanation, and the opinion and findings of the District Court assign no cause for the careening of the lighter in fair weather and calm seas (R. Vol. 1, pp. 20-21, 29). The chief officer who was in charge of the transfer of the tractors from ship to lighter and who observed the casting of the tractors into the harbor testified that he did not know what had caused the accident (R. Vol. 1, p. 29).

The tanks of this, and other lighters of the same pontoon type, are prone to take in water, which condition was known to the Army marine personnel and to local steamship agents (R. Vol. 1, p. 71). The loading of heavy pieces of cargo on that type of lighter when its tanks contain water, causes it to become extremely unstable, and movement of the lighter in swells, results in the free water in its tanks surging from side to side (R. Vol. 1, pp. 27-28, 39-40, 59).

The only evidence in the case as to the underlying cause of the careening of the lighter is that given by the marine superintendent of the United States Armed Forces in Libya, who had supervision over the upkeep of the lighter (R. Vol. 1, p. 46). He attributed the accident to water in the lighter's tanks which entered through the defective tank top lids (R. Vol. 1, p. 50); that when the tractors with other heavy lift cargo were placed on the lighter's deck they caused the lighter to list and the water in the tanks to flow to the lower side until the list exceeded the safety limit, resulting in the tractors and other cargo skidding off the lighter's deck (R. Vol. 1, pp. 34-35, 37-38, 54). The petitioner called no witness to challenge the above testimony.

Rippon made no effort to ascertain, before respondent's tractors were loaded on the lighter, whether or not its tanks contained water (R. Vol. 1, p. 62), either by making application to the marine department of the U. S. Army, the owner of the lighter, to send its tug to open the tank top covers and pump the tanks; or by making similar application to the Tripoli Port & Lights Department, from which agency Rippon had hired the lighter (R. Vol. 1, p. 65).

It was possible for the petitioner to have ascertained whether the lighter's tanks contained water as a record of the date the lighter was last pumped prior to the accident, was made by the coxswain of the U. S. Army pump boat (R. Vol. 1, pp. 52, 53). Petitioner, however, did not examine him as a witness, although counsel for the parties to this action were present in Tripoli and orally examined a number of witnesses (R. Vol. 1, pp. 46, 62, 65, 72).

Petition.

We shall consider the "questions presented" as they appear in the petition.

Question 1. The question raised by the petitioner here is whether the Court of Appeals erred in holding that Sec. 4(2)(q) of the Carriage of Goods by Sea Act (46 U. S. C. Sec. 1304(2)(q)) is applicable to the circumstances of this case. The argument of the petitioner is that the tractors had been landed on the lighter and, as Sec. 1301(e) of COGSA (46 U. S. C., Sec. 1301(e)) provides that the Act "covers the period from the time when the goods are loaded on to the time when they are discharged from the ship", the statute had ceased to regulate the rights of the parties.

While COGSA does not apply *ex proprio vigore*, after cargo has left a ship's tackle, however, its provisions may be made applicable to cargo after the statutory period by a bill of lading provision incorporating the Act. COGSA

was made applicable in the present case by virtue of Clause 1 of petitioner's bill of lading, the comprehensive character of which follows, viz., that the provisions of the Act

> "* * * shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier" (R. Vol. 1, p. 57).

The following cases, among others, have approved the extension of the Act to regulate a non-statutory period under similar forms of bill of lading agreements:

> *Waterman S. S. Co.* v. *United States SR&M Co.*, (5 Cir.), 155 F. (2d) 687, 690-691; cer. den. 329 U. S. 761 (1946);
> *Mackey* v. *United States*, 83 F. Supp. 14, 18-19; affd. 197 F. (2d) 241, 243 (2 Cir., 1952);
> *Remington Rand, Inc.* v. *American Export Lines*, 129 F. Supp. 138 (SDNY, 1955).

That the appellate court below applied Section 4(2)(q) of COGSA as a bill of lading exception and not as a statute, is shown by the language of the opinion (Petition, App. C, p. 18a), viz.,

> "Upon this showing, American Export Lines had the burden of proving that the loss was due to an excepted cause *under its bill of lading*. Because of the invalidity of Clauses 1, 4 and 12, however, American Export could only rely upon Section 4(2)(q) of COGSA (incorporated into the present bill of lading by agreement of the parties) which provides * * *". (Italics supplied.)

Although petitioner now maintains that the appellate court below erred in applying Section 4(2)(q) of COGSA, petitioner pleaded the provisions of that Act, in its answer to the libel, as bill of lading exceptions against liability. (Answer, paragraph Fourteenth; R. Vol. 1, p. 8.)

Question 2. This question presents for consideration the validity of the ruling of the appellate court, holding that exculpatory clauses 1, 4 and 12 of petitioner's bill of lading did not terminate its responsibility for the tractors immediately upon their transfer to the deck of the lighter, because petitioner had failed to prove that the lighter was seaworthy (Petition, App. C, pp. 18a-19a). This is the issue on which the decision in the case turned upon below.

The major part of the briefs of both parties, as well as the opinions of the trial and appellate courts below, were devoted to an analysis and discussion of the two decisions of the Court of Appeals for the Ninth Circuit in *Isthmian S. S. Co.* v. *California Spray-Chemical Corp.*, 290 F. (2d) 486 (9th Cir., 1961); on rehearing, 300 F. (2d) 41 (9th Cir., 1962), which ruled upon the validity of bill of lading clauses (p. 488) which authorized the carrier to effect "delivery" of the cargo by discharging it onto lighters "at the risk and expense of the goods * * * without any responsibility whatever". That Court held the clauses to be invalid under Section 1 of the Harter Act upon the ground that the carrier had not made a "proper delivery" within the purview of that Act, as the damage was proved to have been caused by negligence while on the lighter (pp. 489-491).

As will be noted, the purport of the exculpatory clauses in the *Isthmian S. S. Co.* v. *California Spray-Chemical Corp.* case, *supra*, and the present case, is the same, i.e., an attempt by bill of lading contract, to avoid liability for negligent injury to cargo occurring on a lighter at the port of destination, prior to delivery to the consignee. A strange feature of the petition herein is that, despite the emphasis upon, and discussion of, the rulings in the aforementioned case in the briefs of counsel and the opinions of the trial and appellate courts, there is no reference in the petition to

that case—which was decided in 1962 and is the latest reported decision upon the question, prior to the rulings below in the present case.

Petitioner's argument in support of its contention that its bill of lading clauses 1, 4 and 12 are not in conflict with the Harter Act (46 U. S. C., Secs. 190-193), is that the Act does not prescribe the scope of the carrier's obligation as to place of delivery; it only prevents the carrier from avoiding liability for negligent loss in making delivery to the place it has undertaken to deliver the cargo. The appellate court below summarized petitioner's position in the following language:

> "Appellee relies primarily, however, upon Clause 4 of its bill of lading which purports to make *delivery* of the goods, and thus the termination of the carrier's statutory and contractual liability concurrent with *discharge of the cargo* from the vessel, wherever that discharge may take place. (Emphasis by Court.)
>
> * * * * * *
>
> The purpose of the clause is apparent. By equating 'discharge' with 'delivery' the carrier seeks to eliminate the operation of the Harter Act upon foreign trade. By fiat it seeks to secure immunity from liability which no combination of mere exculpatory clauses could achieve. All of this it purports to accomplish in the name of a freedom of contract which Congress, in enacting Harter and COGSA, found to be largely fictional in view of the disparate positions of the parties." (Petition, App. C, pp. 15a, 16a.)

The appellate court below found unqualified support for its ruling in the language in a prior opinion of the Court which stated the underlying rule as follows:

> "* * * Congress enacted the Harter Act to remedy abuses which had arisen through the efforts of shipowners engaged in common carriage to limit unreasonably their obligations as carriers of goods.

> Sections 1 and 2 (46 U. S. C. A. §§190, 191) forbid them to relieve themselves from certain responsibilities incident to their public calling, even by contract with the shippers * * *." (*Koppers Connecticut Coke Co.* v. *James McWilliams Blue Line*, 89 F. (2d) 865, at p. 866 (2 Cir., 1937).)

The precise contention now urged by petitioner was advanced by the carrier in the Ninth Circuit case of *California Spray-Chemical Corp., supra*, and rejected—the basis of the rejection being that it "leaves no scope for the application of the Harter Act" and is "violative" of that Act (300 F. (2d) 41, at pp. 46, 48, 50).

The contention that the scope of the Harter Act (46 U. S. Code, Secs. 190-193) goes to the "obligation" to deliver and not to how, when or where the carrier shall deliver, was answered in the *California Spray-Chemical Corp.* case, *supra*, as follows (300 F. (2d) 41, at p. 46):

> "* * * the Harter Act seems to contemplate a *carrier liability* which continues up until 'proper delivery' has been effected, regardless of when the carrier's *obligation to transport* the goods ceases. It is the office of the Act to nullify any bill of lading clauses which diminish or destroy this liability. Since the clauses in issue not only provide for lighterage, but *also* relieve appellant from liability for negligence during lighterage, they run counter to the provisions of the Harter Act. The clauses are, therefore, invalid insofar as they purport to relieve appellant of liability for losses due to negligence during lighterage." (Emphasis by Court.)

Although the vessel owner in *Isthmian Steamship Co.* v. *California Spray-Chemical Corp., supra*, sought and obtained a rehearing in the Court of Appeals and, as that Court observed "filed a vigorous and extensive brief" (300 F. (2d) 41, at p. 42), it did not file a petition for a writ of certiorari.